TABLE OF CONTENTS - APPENDIX

Opinion of the United States District Court for the District of Oregon filed May 19, 2000 ..... 1a

Order of the United States District Court for the District of Oregon filed May 19, 2000 ..... 14a

Memorandum of the United States Court of Appeals for the Ninth Circuit filed December 12, 2001..... 16a

Judgment of the United States Court of Appeals for the Ninth Circuit filed December 13, 2001..... 21a

Order Denying Petition for Rehearing En Banc of the United States Court of Appeals for the Ninth Circuit filed January 31, 2002 ..... 23a

Title 42, Chapter 126, Sec. 12101 ..... 25a

Title 42, Chapter 126, Sec. 12102 ..... 28a

Title 42, Chapter 126, Sec. 12112 ..... 34a

29 CFR 1630.2 ..... 41a

ORS 659 Definitions 43a

ORS 659.405. Policy 45a

659.436. Discrimination against disabled persons prohibited 46a

659.437. Qualifications for position 48a

659.349. Reasonable accommodation 48a

FILED
May 19 1243 PM '00
Clerk, U.S. DISTRICT COURT
DISTRICT COURT OF OREGON
BY TE HCC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOSEPH A. CONNOLLY, III, Plaintiff, v. ENTEX INFORMATION SERVICES, INC., Defendant.	Civil No. 99-82-KI OPINION

Stephen L. Brischetto
1001 S. W. Fifth Avenue, Suite 1300
Portland, Oregon 97204

Attorney for Plaintiff

Paul M. Ostroff
Lane, Powell, Spears, Lubersky LLP
601 S. W. Second Avenue, Suite 2100
Portland OR 97204-3158

Jean L. Schmidt
Barry Asen
Admitted *Pro Hac Vice*

Roberts & Finger, LLP
767 Third Avenue
New York, New York 10017

Attorneys for Defendant

KING, Judge:

Plaintiff Joseph A. Connolly brought this action against defendant Entex Information Services, Inc. (Entex"), for disability discrimination under the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq. (The "ADA") and the Oregon counterpart, ORS 659.436. Connolly claims that he is a qualified individual with a disability and that he was discharged from his position as a Senior Customer Engineer because of his disability. Entex admits that Connolly is disabled but denies that he is a qualified individual with a disability or that he was discharged because of his disability. Before the court is Entex's motion for summary judgment (#37). For the reasons set forth below, I grant Entex's motion.

FACTS

Connolly suffers from severe Attention Deficit Disorder ("ADD"), Attention Deficit with Hyperactivity Disorder ("ADHD"), depression, and Asperger's Syndrome (a form of autism).

On September 28, 1996, Entex hired Connolly as a Senior Customer Engineer in its Intel Division. Entex's Intel Division provides computer maintenance and repair services at six Intel Corporation campuses in Oregon.

At the time of his hire, Connolly did not inform Entex of any disabling condition. On his first day of

employment, he checked the "individual with a disability" box on an Affirmative Action form that he submitted to Entex, but he did not provide any information concerning his condition and he did not request any accommodation.

Connolly first worked on Entex's "WinWin" night migration team, transferring data on Intel users' computers and performing related tasks. For approximately two weeks, he also performed WinWin Work Group Analysis on the day shift, which surveyed Intel users' computer operating environments.

In late January 1997, at Connolly's request, he transferred to a Desktop Support position where he was responsible for repairing computer-related problems and assisting Intel users. Intel paid Entex for Desktop Support services based on the number of work orders or "tickets" that Entex closed.[1] Entex's compensation was reduced if it had more than 5% "missed commits," i.e., tickets not closed within the prescribed time.

In March 1997, Connolly's supervisor, Loren Lott, counseled him as to attention and follow-through problems. Connolly did not disagree with Lott's criticisms, but responded that he had ADD, that he suspected that his medication was not working, and that he would see his doctor.

---

[1]Entex asserts that all Desktop Support technicians, including Connolly, were expected to close 18 to 20 tickets per week and to close each ticket within a designated time. Connolly contests whether Entex required each Desktop Support technician to close 18 to 20 tickets per week. Nonetheless, Connolly does not appear to contest Entex's assertion that he failed to close a sufficient number of tickets per week to perform adequately his job.

On April 4, 1997, then Campus Manager Russ Pierce (Lott's supervisor) advised Connolly that his productivity level was unacceptably low. Pierce later informed Connolly that he needed to carry his share of the workload, to follow directions from his Lead Technician and his supervisor without "wandering off" on his own, to effect a "major improvement," and to take a leave of absence if necessary. In his deposition, Connolly testified that he agreed at the time that a major improvement was needed. He elected not to take a leave of absence.

Although the factual record is not entirely clear,[2] it appears that Entex invoked its progressive disciplinary process in late May 1997. On June 24, 1997, Connolly's supervisors met with him and gave him a "Letter of Concern," that set forth the deficiencies in Connolly's work performance (e.g., failing to resolve as few as four tickets a day, failing to follow proper ticket handling and documentation processes) and needed improvements in his work performance.

The day after he received the Letter of Concern, Connolly proposed to the Lead Technician for his team, Terry Schmidt, that Connolly be allowed to transfer to a new position. In early July 1997, Entex proposed to Connolly that he be transferred within the Intel Division to the WinWin team doing Work Group Analysis. Connolly interviewed for the position and it was offered to him on July 9, 1997. Connolly rejected the transfer offer because

---

[2]Contrary to Local Rule 56.1(b), Connolly made only a general objection to the majority of the statements of fact contained in Entex's concise statement.

he viewed the new job as "monotonous" and "redundant."[3] On the same day he received the transfer offer, he wrote an e-mail to management that stated that he would provide them with a detailed "plan of attack" for working his way up to an acceptable level of productivity.

On July 17, 1997, Jim Reavis, a clinical social worker who was Connolly's therapist, asked Entex if he could perform an on-site analysis to see whether an accommodation for Connolly could be identified. Entex ultimately declined Reavis' offer.

On July 21, 1997, Connolly personally proposed an eight-week "Intensive Task Recovery Plan" that set productivity requirements in terms of tickets to be closed per week. Entex agreed to implement the plan on a four-week basis, but made some changes to Connolly's proposal. Specifically, while Entex accepted Connolly's productivity targets for the first and second weeks of the plan (10 and 12 tickets per week, respectively), it modified the proposed targets for the third and fourth weeks (to 15

---

[3]In an affidavit signed in February 2000, Connolly states that, prior to interviewing for the WinWin team position, he informed Jace Vaught, a later Campus Manager, that the WinWin position would not be suitable for his disability because it involved much organization and record-keeping, which he states are areas of weakness due to his disability. Connolly also states that, at the time of the interview, he was concerned because the WinWin team position was temporary in a sense that the Desktop Support positions were not. Connolly Aff., ¶¶ 37-38 (Brischetto Aff., Exh F).

and 18-20 tickets per week, respectively).[4] Subsequently, Connolly failed to meet the productivity requirements of the plan for the first, second and third weeks.

On July 25, 1997, Entex management presented Connolly with a written Final Warning that outlined his more recent performance deficiencies. The document warned Connolly that the next incident of unacceptable performance would result in further corrective counseling, including separation from Entex. Due to continuing performance problems, including Connolly's failure to meet the productivity requirements of the modified Intensive Task Recovery Plan, he was discharged on August 14, 1997.

After his employment with Entex and one other company (from which he was also terminated due to performance problems), Connolly filed a claim for disability benefits with the Social Security Administration. Ultimately, the Social Security Administration declared him totally disabled and unable to work as of August 14, 1997 – his last day of work at Entex.

LEGAL STANDARDS

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once

---

[4]I note that the modified productivity requirement for the third week (minimum 15 per week) was only slightly different from Connolly's proposal for the third week (minimum 12; maximum 15).

the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2552-53 (1986). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir.), cert. denied, 493 U.S. 809 (1989).

DISCUSSION

To prevail on his claim of disability discrimination under the ADA, Connolly must establish that (1) he has a disability; (2) he is a qualified individual with a disability, i.e., that with or without reasonable accommodation, he is capable of performing the essential functions of the job; and(3) he was terminated because of his disability. Bradley v. Harcourt, Brace and Co., 104 F3d 267, 271 (9th Cir. 1996) (citing Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996)). Connolly must make a similar showing to prevail under his disability discrimination claim brought under Oregon law. Most relevant to the motion before the court is Connolly's ability to establish that he is a qualified individual with a disability.

To come within the protection of both the ADA and ORS 659.436, Connolly must be qualified to perform his former position as a Senior Customer Engineer. Under the ADA, a qualified individual is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). See also OAR 839-006-0205(4) ("An 'otherwise qualified disabled person' is an individual with a disability who

satisfies the requisite skill, experience, education or other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.").

Connolly does not dispute that he did not perform satisfactorily the essential functions of his Desktop Support position at Entex. Instead, he argues that, if he had been given a reasonable accommodation by Entex, he would have been able to perform satisfactorily. When an ADA claim is based on an employer's alleged refusal to make a reasonable accommodation, the plaintiff bears the burden of producing evidence that "a specific, reasonable accommodation was available to the defendant at the time plaintiff's limitations became known." Willis v. Pacific Maritime Association, 162 F3d 561, 565 (9th Cir. 1998) (quoting Barnett v. U.S. Air, Inc., 157 F3d 744, 748 (9th Cir. 1998)).

I first examine the accommodations that have been identified by Connolly. In his amended concise statement of facts, Connolly points to affidavits from his therapist (Reavis) and physician (George A. Keepers, M.D.), to support the allegation that accommodations were in existence that would have enabled him to meet Entex's standards. Those affidavits, however, do not identify or describe any concrete accommodations that would allow Connolly to perform in his Desktop support position. The affidavits, at best, express a belief that accommodations could have been designed. As such, Connolly's case rests on the only other documentary evidence that he has submitted to demonstrate a specific, reasonable accommodation. That evidence is a report from a psychiatrist, E. Gene Stubbs, M.D., dated December 19, 1999.

The relevant portion of Dr. Stubbs' report reads as follows:

> I believe the following accommodations could have helped Mr. Connolly be successful in applying his talents to the job, while overcoming his deficits due to his disabilities: 1) providing structure, for example, assigning Mr. Connolly one job at a time, with an estimate of how long the supervisor would estimate it would take him to finish, and to have Mr. Connolly set his alarm watch to go off every 30 minutes. 2) To assign a co-staff to work alongside Mr. Connolly, so that the co-staff could cue Mr. Connolly when Mr. Connolly got distracted, or was getting too wordy with a customer. 3) To give him a set of written rules which would be posted at his worksite informing him of the steps required to leave early to see his doctor or pick up medication. He could be reminded of how much sick time or personal time that he has left, and how much he has used. 4) To assign him an advocate either from inside the company or outside the company who could attend meetings with his supervisors, who could serve as an advocate for Mr. Connolly, serve as a spokesperson, could serve as an extra pair of eyes and ears to provide feedback to Mr. Connolly so that he doesn't shut down when he is feeling overwhelmed, could serve as someone to whom he could vent when he was feeling stressed, and could help him problem-solve difficult situations. 4) To provide visual strategies, verbal cues and feedback, and auditory signals to help provide necessary cues to help Mr. Connolly complete his work in a timely and thorough manner. 5) To assign a clerical staff to assist Mr. Connolly with his paper work and documentation. For example, after each job, this

> person could review the paperwork with Mr. Connolly to ensure that it is complete.

Brischetto Affidavit, Exh. B, pp. 1-2.

At the outset, I am reluctant to endorse, as a reasonable accommodation, the hiring of a "shadow" employee to ensure that another employee performs his essential job functions. Connolly also provides no precedent in support of such an argument. As to Dr. Stubbs' other suggested accommodations, only the first and fourth provide a feasible mechanism to increase Connolly's productivity (i.e., closing of tickets). I find that the vagueness of the suggestions, combined with evidence that Entex did provide the type of assistance suggested, precludes this evidence from defeating summary judgment. For instance, it appears to be undisputed that Entex reduced Connolly's tickets to two at a time (instead of four or five) and gave Connolly paper print-outs of his tickets and trouble-shooting tips. Likewise, Entex gave Connolly a checklist to help him remember ticket handling procedures.

In short, Connolly has not shown that he would have been able to perform the essential functions of the Desktop Support position even with an accommodation designed to allow him to perform that job. For the purposes of this opinion, however, I do not find that such a deficiency is sufficient for summary judgment. Instead, I will assume that in a situation in which an employee cannot perform the essential functions of his current position with a reasonable accommodation, the ADA requires the employer to offer a reassignment of the employee to a position that he can perform. See Smith v. Midland Brake, Inc., 180 F3d 1154, 1169. (10th Cir. 1999) ("If no reasonable accommodation can keep the employer in

his or her existing job, then the reasonable accommodation may require reassignment to a vacant position so long as the employee is qualified for the job and it does not impose an undue burden on the employer.") Nonetheless, because Entex did make such an offer to Connolly, and he refused the reassignment, summary judgment is appropriate. Id. At 1177 ("[T]he employer is free to choose the reassignment that is to be offered to the qualified individual with a disability. If the disabled individual rejects that reassignment, the employer is under no obligation to continue offering other reassignments.").

As stated in the facts set forth above, Entex offered to reassign Connolly back to the WinWin team doing Work Group Analysis. The record reflects that, prior to Connolly transferring to the Desktop Support position, he successfully performed Work Group Analysis for two weeks as part of the WinWin team. The reassignment was a reasonable accommodation in light of the fact Connolly would have remained a Senior Customer Engineer and apparently received the same pay. I am not convinced that Connolly would have had less job security at the WinWin job (due to the temporary nature of the work) than if he had remained in a Desktop Support position or that such a factor would prevent the proposed reassignment from qualifying as a reasonable accommodation.

Because Connolly (1) has failed to identify any reasonable accommodation that would have allowed him to perform the essential functions of a Senior Customer Engineer in a Desktop Support position, and (2) opted not to take the reassignment to the WinWin position offered by Entex, he is not a qualified individual with a disability under the ADA or Oregon law and summary judgment is

appropriate.[5]

The case for summary judgment is further strengthened by Connolly's failure to reconcile adequately the apparent inconsistency between his representation of total disability to the Social Security Administration and his claim in this lawsuit that he was, in fact, capable of working for Entex as a Senior Customer Engineer.

In Cleveland v. Policy Management Systems Corp., __ U.S. __ 119 S. Ct. 1597 (1999), the Supreme Court held that an ADA plaintiff cannot ignore the apparent contradiction that arises out of an earlier SSDI total disability claim and, instead, must proffer a sufficient explanation:

> When faced with a plaintiff's previous sworn statement asserting "total disability" or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror[] concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless "perform the essential functions" or her job, with or without "reasonable accommodation."

Cleveland, 119 S. Ct. at 1604.

The most apparent inconsistency in Connolly's case is the fact that he was found to be disabled as of the last

---

[5]Because I find that Connolly is not a qualified individual with a disability, I do not reach the issue of whether he was fired because of his disability.

day of his employment at Entex, yet Connolly argues that he was able to perform, with reasonable accommodation, the essential functions of his Desktop Support position as of that time. He attempts to explain away this inconsistency by arguing that the way in which he was supervised and treated at Entex, after his poor work performance became evident, caused his ability to work to deteriorate. Plaintiff's Opposition Brief, pp. 13, 15. The problem with this argument is, of course, that he had already demonstrated an inability to perform the essential functions of the Desktop Support position before he was subject to any disciplinary actions by Entex management.

I am reluctant to find that the standard set forth in Cleveland, when applied to this case, provides an independent basis for summary judgment. This is due to the fact that the record is not clear in regard to the representations that Connolly made to the SSA about the onset of his inability to work. Nonetheless, when viewed in the light of the other fatal flaws in Connolly's argument that he is a qualified individual with a disability, an application of the Cleveland standard provides further support for summary judgment in this case.

CONCLUSION

Based on the foregoing, the motion for summary judgment (#37) by Entex Information Services, Inc., is GRANTED.

DATED this 19th day of May 2000.

Garr M. King

GARR M. KING
United States District Court Judge

FILED
May 19 1243 PM '00
Clerk, U.S. DISTRICT COURT
DISTRICT COURT OF OREGON
BY TE HCC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOSEPH A. CONNOLLY, III, Plaintiff, v. ENTEX INFORMATION SERVICES, INC., Defendant.	Civil No. 99-82-KI ORDER

Stephen L. Brischetto
1001 S. W. Fifth Avenue, Suite 1300
Portland, Oregon 97204

Attorney for Plaintiff

Paul M. Ostroff
Lane, Powell, Spears, Lubersky LLP
601 S. W. Second Avenue, Suite 2100
Portland OR 97204-3158

Jean L. Schmidt
Barry Asen
Admitted *Pro Hac Vice*

Roberts & Finger, LLP
767 Third Avenue
New York, New York 10017

Attorneys for Defendant

KING, Judge:

The motion for summary judgment (#37) by Entexx Information Services, Inc., is GRANTED.

IT IS SO ORDERED.

DATED this 19th day of May, 2000.

Garr M. King
GARR M. KING
United States District Court Judge

FILED
DEC 13 2001

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH CONNOLLY, III,	) No. 00-35534
Plaintiff-Appellant	) D.C. No. CV 99-00082-GMK
v.	)
	) MEMORANDUM*
ENTEX INFORMATION SERVICES, INC., a Delaware Corporation	)
Defendant-Appellee	)

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Court Judge, Presiding

Argued and Submitted May 10, 2001
Portland, Oregon

Before: GOODWIN, GREENBERG,** and RAWLINSON, Circuit Judges

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The Honorable Morton I. Greenberg, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Appellant Joseph A. Connolly III ("Connolly") appeals the district court's grant of summary judgment to Entex Information Services, Inc. ("Entex") in Connolly's disability discrimination action brought pursuant to the Americans with Disabilities Act, 42 U.S. C. § 12101 et seq. ("ADA") and Oregon Revised Statutes § 659.436. Connolly alleged that Entex discharged him from his position as Senior Customer Engineer because of his disability, which consisted of Attention Deficit Disorder ("ADD"), Attention Deficit Hyperactivity Disorder ("ADHD"), depression, and Asperger's Syndrome, a form of autism. Entex countered that Connolly was terminated for low productivity after numerous warnings and his refusal to transfer to a different job that Entex offered. We affirm the district court's grant of summary judgment in favor of Entex.

Connolly joined the Desktop Support team after performing successfully for the trial period of 120 days in another group, the WinWin team. While in the Desktop Support team, he had several conversations with managers regarding his performance and his failure to close the number of tickets required by the department (approximately 18-20 per week). He was warned that he had to improve his performance. When he pointed to his ADD and switching medications as a source of his problem, his manager suggested that he take a medical leave of absence. Connolly requested a transfer to a

"special projects" work group within Desktop Support that did not have a ticket count requirement, but Entex stated that the technicians assigned to that team were the best and most reliable since they functioned independently under a great deal of stress.

On July 9, 1997, Connolly was offered a transfer to the WinWin team doing work group analysis for the same pay and under the same title, but he considered the job as inappropriate for him and "monotonous." According to Entex, the WinWin Group was responsible for converting about 9,000 Intel computers from DOS to Windows NT, and the group performed "migration," a process of standardizing computers, and "analysis," which was surveying the current computer operating environments. Entex states that WinWin technicians did not have a productivity requirement and that the position was less demanding. Connolly felt that the job involved record-keeping and organization which were his areas of weakness and that the temporary nature of the job also made it more undesirable. He interviewed for the position on July 9, 1997, with Jason Bowman, who would be his supervisor and with whom he had worked earlier on the WinWin team with no problems. He was offered the job but turned it down.

Connolly argues that Entex failed to provide reasonable accommodation because it failed to enter the interactive process with him, but Connolly does not show that Entex did not make a good faith effort to provide a reasonable accommodation. Connolly contends that although he has the burden of production of each element of his prima facie case, he does not have the burden of demonstrating any specific reasonable accommodation because it was Entex's burden to enter into the interactive process which Connolly requested. However, according to

Connolly, although Entex management did not meet with him in person weekly as he requested, they did e-mail with him and speak with him regularly on the phone and meet with him several times, during which a discussion of reasonable accommodations occurred.

Entex offered Connolly a medical leave of absence; reduced the number of tickets assigned to him at one time to two tickets rather than four or five; printed out his tickets; instructed his supervisor to show him how to create reports from REX with information from the tickets; gave him a checklist and binder in which he could take notes and track pertinent data to aid in his record keeping difficulties; agreed to a modified intensive recovery program; and offered him another job in the WinWin group at the same pay and title. Therefore, Connolly did not show that Entex failed to make a good faith effort to assist him in seeking accommodation.

Connolly argues that he was not given the reassignment that he desired, but Entex was not required to give him the reassignment of his choice. *See Barnett v. U.S. Air, Inc.*, 228 F. 3d 1105, 1110 (9th Cir. 2001). The goal is to identify an accommodation that allows the employee to perform the job effectively, not to provide the job of the employee's choice. *See id.* Entex offered Connolly a job in the WinWin group where he had worked previously and performed adequately. Since Connolly had previously demonstrated that he could perform that job effectively, Entex satisfied its accommodation obligation by offering the WinWin position to Connolly.

Oregon Revised Statutes § 659.449 provides that Oregon law is to be construed consistently with the federal ADA. Since we have found that Entex did not violate the federal ADA, a similar finding follows as to Connolly's

claims under the Oregon statute.

AFFIRMED.

JUDGMENT
COSTS TAXED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 00-35534
CT/AG#: CV-99-00082-GMK

JOSEPH CONNOLLY, III

Plaintiff - Appellant

v.

ENTEX INFORMATION SERVICES INC., a Delaware Corporation

Defendant - Appellee

APPEAL FROM the United States District Court for the District of Oregon (Portland).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Portland)
and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered December 13, 2001

FILED
JAN 31 2002

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH CONNOLLY, III,	) No. 00-35534
	)
Plaintiff-Appellant,	) D.C. No. CV 99-00082-GMK
v.	)
	) ORDER DENYING
ENTEX INFORMATION	) PETITION FOR
SERVICES, INC., a Delaware	) REHEARING
Corporation,	) EN BANC
	)
Defendant-Appellee	)

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Court Judge, Presiding

Argued and Submitted May 10, 2001
Portland, Oregon

Before: GOODWIN, GREENBERG,* and RAWLINSON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing en banc. Judge

Rawlinson so voted and Judges Goodwin and Greenberg so recommended.

The full court has been advised of the petition for rehearing en banc, and no active judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

Appellant's petition for rehearing en banc, filed January 3, 2002, is DENIED.

---

*The Honorable Morton I. Greenberg, Senior Judge of the United States Court of Appeals for the Third Circuit, sitting by designation.

US CODE

Title 42, Chapter 126, Sec. 12101

Sec. 12101. - findings and purpose

(a) Findings

The Congress finds that -

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation of lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies

people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter -

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Title 42, Chapter 126, Sec. 12102

Sec. 12102. - Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes -

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual -

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

Title 42, Chapter 126, Sec. 12111

Sec. 12111. - Definitions

As used in this subchapter:

(1) Commission

The term "commission means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant

risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include -

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 801 et seq.). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provision of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled substances Act (21 U.S.C. 812).

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with our without reasonable accommodation,

can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include -

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10)

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in

subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include -

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Title 42, Chapter 126, Sec. 12112

Sec. 12112. - Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or a discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes -

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration -

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability or an individual with whom the qualified individual is known to have a relationship or association;

(5)

(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the

standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any

practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on -

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment Entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the result of such examination, if -

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that -

(I) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary

accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at the work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

Code of Federal Regulations, 29 CFR 1630.2

Sec. 1630.2 Definitions

***

(m) Qualified individual with a disability means an individual with a disability who satisfied the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

***

(o) Reasonable accommodation.

(1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

As used in ORS...659.010 to 659.110 and 659.400 to 659.545, unless the context requires otherwise:

***

(14) "Unlawful employment practice" includes only those unlawful employment practices specified in ORS...659.400 to 659.494.

***

659.400. Definitions for ORS 659.400 to ORS 659.460

As used in ORS 659.400 to 659.460, unless the context requires otherwise:

(1) "Disabled person" means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

(2) As used in subsection (1) of this section:

(a) "Major life activity" includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

(b) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(c) "Is regarded as having such an impairment" means that the individual:

(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or

(C) Has none of the impairments described in subparagraph (A) or (B) of this paragraph, but is treated by an employer or supervisor as having a mental or physical impairment that substantially limits one or more major life activities.

(d) "Substantially limits" means:

(A) The impairment renders the person unable to perform a major life activity that the average person in the general population can perform; or

(B) The impairment significantly restricts the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

(3) "Drug" means a controlled substance, as classified in schedules I through V of section 202 of the Controlled Substances Act, 21 U.S.C.A. 812, as amended, and as modified under ORS 475.035.

(4) "Employer" means any person that employs six or more persons and includes the state, counties, cities, districts, authorities, public corporations and entities and their instrumentalities, except the Oregon National Guard.

(5) "Illegal use of drugs" means any use of drugs, the possession or distribution of which is unlawful under state law or under the Controlled Substances Act, 21 U.S.C.A. 812, as amended, but does not include the use of a drug taken under supervision of a licensed health care professional, or other uses authorized under the Controlled Substances Act or under other provisions of state or federal law.

ORS 659.405. Policy

(1) It is declared to be the public policy of Oregon to guarantee disabled persons the fullest possible participation in the social and economic life of the state, to engage in renumerative employment, to use and enjoy places of public accommodation, resort or amusement, and to secure housing accommodations of their choice, without discrimination.

(2) The right to otherwise lawful employment without discrimination because of disability where the reasonable demands of the position do not require such a distinction, and the right to use and enjoy places of public accommodation, resort or amusement, and to purchase or rental of property without discrimination because of disability, are hereby recognized and declared to be the rights of all the people of this state. It is hereby declared to be the policy of the State of Oregon to protect these rights and ORS 659.400 to 659.460 shall be construed to effectuate such policy.

ORS 659.436

659.436. Discrimination against disabled persons prohibited.

(1) It is an unlawful employment practice for any employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because an otherwise qualified person is a disabled person.

(2) An employer violates subsection (1) of this section if the employer does any of the following:

(a) The employer limits, segregates or classifies a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee because the applicant or employee is a disabled person.

(b) The employer participates in a contractual or other arrangement or relationship that has the effect of subjecting an otherwise qualified job applicant or employee who is a disabled person to the discrimination prohibited by ORS 659.536 to 659.449, including but not limited to participating in a relationship with an employment or referral agency, a labor union, an organization providing fringe benefits to an employee of the employer, or an organization providing training and apprenticeship programs.

(c) The employer utilizes standards, criteria or methods of administration that have the effect of discrimination on the basis of disability, or that perpetuate the discrimination of others who are subject to common administrative control.

(d) The employer excludes or otherwise denies equal jobs or benefits to an otherwise qualified person because the person is known to have a relationship or association with a disabled person.

(e) The employer does not make a reasonable accommodation to the known physical or mental person who is a job applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer.

(f) The employer denies employment opportunities to a job applicant or employee who is an otherwise qualified disabled person, if the denial is based on the need of the employer to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

(g) The employer uses qualification standards, employment tests or other selection criteria that screen out or tend to screen out a disabled person or a class of disabled persons unless the standard, test or other selection criterion, as used by the employer, is shown to be job-related for the position in question and is consistent with business necessity.

(h) The employer fails to select and administer tests relating to employment in the most effective manner to ensure that when the test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude or other characteristics of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual or speaking skills of the employee or applicant. The provisions of this

paragraph do not limit the ability of an employer to select or administer tests designed to measure sensory, manual or speaking skills of an employee or job applicant.

ORS 659.437

659.437. Qualifications for position.

For the purposes of ORS 659.436, a disabled person is otherwise qualified for a position if the person, with or without reasonable accommodation, can perform the essential functions of the position. For the purpose of determining the essential functions of the position, due consideration shall be given to the employer's determination as to the essential functions of a position. If an employer has prepared a written description before advertising or interviewing applicants for a job, the position description shall be considered evidence of the essential functions of the job.

ORS 659.439

659.349. Reasonable accommodation.

(1) For the purposes of ORS 659.436, reasonable accommodation of an otherwise qualified disabled person may include:

(a) Making existing facilities used by employees readily accessible to and usable by disabled persons.

(b) Job restructuring, part-time or modified work schedules or reassignment to a vacant position.

(c) Acquisition or modification of equipment or devices.

(d) Appropriate adjustment or modification of examinations, training materials or policies.

(e) The provision of qualified readers or interpreters.

(2) Notwithstanding any other provision of ORS 659.400 to 659.460, an employer may not be found to have engaged in an unlawful employment practice solely because the employer fails to provide reasonable accommodation to a person with a disability arising out of transsexualism.

[Codified 1999]